

Filed Sep. 30, 1986

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Midwest Federal Savings Bank, Plaintiff and Appellee

v.

Paul S. Symington, Defendant and Appellant and Lois J. Symington, Dave Parker and D. J. Parker, Inc., Employee's Pension Plan & Trust; And all other persons unknown claiming any estate or interest in or lien or encumbrance upon the real estate described in the Complaint, Defendants

Civil Nos. 11,211, 11,212

Midwest Federal Savings Bank, Plaintiff and Appellee

v.

Paul S. Symington, Defendant and Appellant and Lois J. Symington, First National Bank in Grand Forks; Dave Parker and D. J. Parker, Inc., Employee's Pension Plan & Trust; And all other persons unknown claiming any estate or interest in or lien or encumbrance upon the real estate described in the Complaint, Defendants

Civil No. 11,213

Bushee Property Management, Inc., on behalf of Midwest Federal Savings Bank, a North Dakota corporation, Plaintiff and Appellee

v.

Paul Symington, d/b/a St. James Place Apartments, Defendant and Appellant

Civil No. 11,214

Appeal from the District Court of Grand Forks County, the Honorable Joel D. Medd, Judge.

APPEAL DISMISSED.

Opinion of the Court by VandeWalle, Justice.

Karen K. Braaten, Grand Forks, for plaintiff and appellee Midwest Federal Savings Bank.

Nelson, Kalash & Molenaar, Grand Forks, for plaintiff and appellee Bushee Property Management, Inc.
Submitted on brief.

Bruce E. Bohlman, Grand Forks, for Richard L. Nelson, Trustee in Bankruptcy for defendant and appellant Paul Symington.

VandeWalle, Justice.

Paul Symington has appealed from a memorandum decision clarifying the district court's previous memorandum decision that addressed various questions concerning a trustee's collection of rents from and payment of expenses for commercial property undergoing foreclosure. We dismiss the appeal.

The right of appeal in this State is statutory and is a jurisdictional matter which we may consider sua sponte. Olson v. Job Service North Dakota, 379 N.W.2d 285 (N.D. 1985). Generally, a memorandum decision is not appealable under § 28-27-02, N.D.C.C. Chas. F. Ellis Agency, Inc. v. Berg, 214 N.W.2d 507 (N.D. 1974). However, we have held that an appeal may be taken from a memorandum decision if the record also contains a final order or judgment which is consistent with the memorandum decision (see Federal Sav. & Loan Ins. Corp. v. Albrecht, 379 N.W.2d 266 (N.D. 1985)), or if there is an indication in the memorandum decision that it was intended to constitute a final order of the court (see Chas. F. Ellis Agency, Inc., *supra*). Neither exception is applicable in this case.

Symington has attempted to appeal from a "Memorandum Decision Clarifying Payment of Real Estate Taxes." The record contains no final order or judgment which is consistent with that memorandum decision. Furthermore, we discern no intent by the district court that the memorandum decision was to constitute a final order. The memorandum decision, dated February 3, 1986, was issued to clarify the court's legal conclusion as to one of three questions addressed in a previous memorandum decision dated December 30, 1985. In its December 30 memorandum decision, the district court noted that "there has never been a full hearing and accounting as to exactly what monies each party may be entitled to.... Without such full accounting by both sides it is virtually impossible for the Court to order a distribution at this time.... After expiration of the period of redemption or the termination of the trusteeship, whichever occurs first, the Court anticipates a further hearing as to the distribution of the funds and payment of expenses."

Thus it is clear that the district court intended neither the December 30 memorandum decision nor the February 3 memorandum decision to constitute a final order of the court. 1

Accordingly, the appeal is dismissed.

Gerald W. VandeWalle
Ralph J. Erickstad, C.J.
H.F. Gierke III
Herbert L. Meschke
Beryl J. Levine

Footnotes:

1. Assuming that the February 3 memorandum decision was intended to be a final order as to one of the three issues addressed in the December 30 memorandum decision, the record contains no Rule 54(b), N.D.R.Civ.P., certification, nor is a Rule 54(b) determination implicit in the district court's decision. See Brown v. Will, 388 N.W.2d 869 (N.D. 1986). Even if a Rule 54(b) order had been granted in this case, it is questionable whether under these circumstances the order would be deemed to have been providently granted. See Buurman v. Central Valley School Dist., 371 N.W.2d 146 (N.D. 1985); Union State Bank v. Woell, 357 N.W.2d 234 (N.D. 1984).